

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

MARVIN GAY,

Petitioner,

: Case No. 3:16-cv-333

- vs -

District Judge Walter Herbert Rice
Magistrate Judge Michael R. Merz

BRYAN COOK, WARDEN,

:

Respondent.

REPORT AND RECOMMENDATIONS

On initial review of this habeas corpus case in August, 2016, the Court ordered it stayed to allow Petitioner to exhaust his state court remedies (Order, ECF No. 2). Petitioner was ordered to file a motion for delayed appeal with the second District Court of Appeals by September 1, 2016, and file a copy of that motion with this Court.

The docket reflects Petitioner has filed nothing with this Court since August 9, 2016. A review of the docket of his criminal case at the Montgomery County Clerk of Courts website reveals nothing has been filed there either. Because Petitioner was serving only a seven-month sentence which would have expired by now, it appears he has abandoned the challenge to his conviction.

It is accordingly recommended that the Petition herein be dismissed without prejudice for lack of prosecution. Because reasonable jurists would not disagree with this conclusion, Petitioner should be denied a certificate of appealability and the Court should certify to the Sixth

Circuit that any appeal would be objectively frivolous and therefore should not be permitted to proceed *in forma pauperis*.

November 23, 2106.

s/ *Michael R. Merz*
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(d), this period is extended to seventeen days because this Report is being served by one of the methods of service listed in Fed. R. Civ. P. 5(b)(2)(C), (D), (E), or (F). Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 153-55 (1985).